IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

_____ 78-1795

ALFRED H. HARDWICK,

Petitioner.

v.

NU-WAY OIL CO., INC.
AND
BILLY DELP

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

INDEX

CASE CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, ALFRED H. HARDWICK, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on February 14, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, (p. 19, infra) is reported at 589 F.2d 806, 1979-1 Trade Cases ¶62,482. The opinion of the District Court for the Southern District of Texas (p. 25, infra) is reported at 443 F.Supp. 940, 1978-1 Trade Cases ¶61,909.

JURISDICTION

The judgment of the Court below (p. 19, infra) was entered on February 14, 1979. A timely Petition For Rehearing En Banc was denied on March 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner brought this action under §4 of the Clayton Act for treble damages alleging that the contract between the Respondent and the ex-wife of the Petitioner was an illegal price fixing agreement and was a per se violation of §1 of the Sherman Act and (had been) a key part of a predatory price cutting conspiracy which destroyed Petitioner's separate business. After extensive pre-trial discovery resulting in extensive but only partially stipulated facts, Petitioner filed a motion for partial summary judgment and Respondents filed a motion for full summary judgment. Petitioner's motion was denied and Respondents' was granted. The Fifth Circuit Panel decision affirmed the judgment of the trial court. The questions thereby arising are:

1. Whether the judgment of the Court of Appeals conflicts with the rule of Simpson v. Union Oil Company of California, 377 U.S. 13, since in this case the supplier fixed the retail price of gasoline which it consigned to the station operator and the station operator, not the supplier, owned the station.

supplied all employees, did not operate the station under the supplier's name, and was generally an independent business person.

2. Whether the operator of the gasoline station in question was an employee of Respondent gasoline supplier with respect to the antitrust laws, thus legalizing the fixing of the retail price by the supplier, even though the operator owned the land and building for the station, was responsible for supply of all employees to run the station, and paid all utilities for the station operation; and the supplier did not control the details of performance of the work, did not have the right so to do, did not withhold federal income or FICA taxes from the compensation of the operator, and required the operator to agree that under no circumstances should the operator be considered an employee of supplier and was for all purposes an independent contractor.

3. Whether Petitioner had standing to maintain this suit.

STATUTES INVOLVED

This case involves §1 of the Sherman Act, 15 U.S.C. §1 and §4 of the Clayton Act, 15 U.S.C. §15, which read in pertinent part as follows:

<u>SHERMAN ACT SECTION 1, (15 U.S.C. §1</u>

> "§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty
>
> Every contract, combination in the form of trust or otherwise,

or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . * * *
July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282."

CLAYTON ACT, SECTION 4 (15 U.S.C. § 15)

"§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731."

STATEMENT OF THE CASE

(Hereafter "St." means Stipulation and "R." means Record)

Trial court jurisdiction arises under 28 U.S.C. §1331, granting federal question jurisdiction. The amount in controversy exceeds $1,000,000.

The Plaintiff is Alfred H. Hardwick, who, with his wife, Marcelina Hardwick,

operated a business in Ricardo, Texas, from 1968 until November, 1971 at which they sold groceries and gasoline (R. 491, St. 11, 13, 14; R. 494, St. 34, R. 360, St.5). The name of the business was "Al's Self-Service" and the gasoline sold there was supplied by Respondent/Defendant Nu-Way Oil Company (R. 491, St. 11, 14). Al's Self-Service was set upon a tract purchased by Alfred Hardwick and his wife (R. 491, St. 13, 14), and was located on U.S. Highway 77, a major artery handling traffic between the U.S. and Mexico (R. 491, St. 12, 16). Ricardo, Texas, is located approximately 100 miles from the U.S. - Mexican border (R. 491, St. 17).

In 1970, the Texas Highway Department, wishing to widen U.S. Highway 77, acquired from the Hardwicks the bulk of the land upon which their station was located. In March of 1971, Alfred Hardwick leased, with an option to buy, another site for his business in Ricardo. The new site was located nearby. (R. 362, St. 32). Alfred Hardwick began constructing a new building for his business. After being refused supply by Nu-Way, he entered into an agreement with a competitor of Nu-Way to furnish him gasoline at the new station (R. 362, St. 33), and gasoline sales began in October, 1971 (R. 362, St. 34). Petitioner closed the old station at the end of October, 1971.

On November 4, 1971, the Nu-Way area manager initated gasoline delivery to the "old" Al's Self-Service. (R. 498, St. 76), and entered into an arrangement on that date with Marcelina Hardwick, Alfred Hard-

wick's (now estranged) wife, to continue the operation of the old Al's Self-Service without the knowledge or agreement of Alfred Hardwick. (R. 498, St. 75) There were then two Al's Self-Service Stations operating on U.S. Highway 77, in Ricardo, Texas (R. 499, St. 77).

Upon re-opening of the old Al's Self-Service by Marcelina Hardwick, the price of gasoline was reduced three cents below that which it had been immediately prior to the closing of the station by Alfred Hardwick (R. 501, St. 86, R. 528). This amount was below the price of gasoline that was being sold at the "new" Al's Self-Service as well as below the price of the nearest other Nu-Way supplied station within the competitive area supplied by Nu-Way (R. 499, St. 83). The price of regular gasoline at the old Al's Self-Service, when it was re-opened, was 24.9 cents per gallon and approximately 20 days later it was reduced to 23.9 cents per gallon (R. 499, St. 82, R. 528). The Nu-Way area manager testified that the lowest price Nu-Way could sell gasoline for in Ricardo, Texas, and still make a profit was 24.9 cents per gallon (R. 260, p. 265). During the same time, the price at the nearest other station supplied by Nu-Way within the competitive area was 27.9 cents for regular (R. 499, St. 83). Within approximately six weeks, Alfred Hardwick closed his new station because of lack of business. (R. 177, p. 185, 178).

The contract entered into between Marcelena Hardwick and Nu-Way was essentially the same contract that had controlled the dealings of Al Hardwick and Nu-Way Oil Company (R. 498, St. 75). That contract (R. 510 - 513) provided in paragraph 7 that the operator was " . . . an independent contractor making sales of gasoline consigned to operator by supplier (Nu-Way) and <u>nothing in this agreement shall be construed to create any partnership, joint venture, or employment relationship between the parties</u>, or shall either party be the agent of the other party for any purpose, save and except that owner and operator shall hold proceeds of sale of gasoline in trust and for the account of supplier." [Emphasis added] The contract further provided that Nu-Way had the right to set the price of gasoline at the station. This right was exercised and the price of gasoline set at the old Al's Self-Service was determined solely by Nu-Way. (R. 492, St. 23, R. 493, St. 24).

The operation of Marcelena Hardwick's station was essentially as follows: (1) Marcelena Hardwick furnished (a) the land and building for the gasoline station; (b) the cash register; (c) building furnishings and (d) all personnel; (2) Marcelena Hardwick would maintain and repair the store building at her costs, and would report to the company any breakdown or malfunction of equipment (R. 506); (3) she would order gasoline from Tesoro Petroleum Company whenever the tanks needed replenishing (R. 263, p. 14); (4) the gasoline was delivered by a third party, Tesoro, and was paid for by Nu-Way (R.

507); (5) the operator would collect the money from the sale of gasoline and deposit it in a Nu-Way bank account on a regular basis; (6) Nu-Way retained title to all gasoline until it was run through the meters on the gasoline pump; (7) she received a fixed sum per month from Nu-Way; (8) Nu-Way would pay no FICA or employment taxes on Marcelena Hardwick and withheld no part of her compensation for the payment of Federal Income Taxes (St. 17); (9) the gasoline tanks, pumps, and all other gasoline sales equipment were leased by Nu-Way from a third party, and were installed at Nu-Way's cost (R. 506, St. 113); (10) if needed, Nu-Way would maintain and repair the gasoline sales equipment (R. 506, St. 113).

Additional services performed by Marcelena Hardwick or her employees in connection with the sale of gasoline were the following: (1) physically change the price of gasoline on the pumps (R. 263, p. 22, 23); (2) collect the money from the customer (R. 508, St. 114); (3) gauge the tanks (R. 263, p. 12); (4) read and record the meters on the gasoline pumps at the opening and close of each business day (R. 263, p. 12).

The Defendant/Respondent, Nu-Way Oil Company, is primarily directed by the Defendant/Respondent Billy Delp, and Delp and John Harvison substantially control Nu-Way as well as two other corporations, Economy Oil Company and Dynamic Industries, Inc. (R. 490, St. 2). All three corporations are

operated out of the same office in Ft. Worth, Texas, (R. 490, St. 4) they utilize the same home office personnel (R. 490, St. 5), and usually the same supervisory personnel for their gasoline sales outlets (R. 491, St. 6). The three corporations operate self-service gasoline stations in essentially the same manner with the companies setting the retail price of the gasoline (R. 493, St. 27). The three corporations had self-service gasoline stations in the following states in the following numbers: (1) Nu-Way Oil Company: 78 stations in Texas and 18 in Arkansas, as of November 1971; (2) Dynamic Industries, Inc.: 6 stations in Alabama, 19 in Mississippi and 13 in Texas, in December 1971; (3) Economy Oil Company, 19 stations in December 1971, and 30 stations in December 1973, all of which were in Texas (R. 491, St. 8, 9, 10).

In stations operated and acquired in the same manner as the Marcelena Hardwick station, Nu-Way, Economy and Dynamic had combined sales in four states in excess of 9.3 million dollars in 1971, 15 million dollars in 1972 and 17 million dollars in 1973. (R. 502, 503, St. 102-107).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, unless reversed, will lead to widespread price fixing and will immunize such price fixing from Sherman Act attack by either the Government or private plaintiffs. Not only will this decision have great undesirable impact in the field of self-

service gasoline stations, it also will have substantial undesirable impact on price fixing of retail sales of all sorts of merchandise. This is because the rationale of the opinion of the Court of Appeals is as readily applicable to general merchandising as it is to the merchandising of gasoline. The sale of gasoline at self-service stations is rapidly becoming the dominant form of merchandising gasoline. It has come to this position within the last 10 years. Full service stations are on their way out as a major factor in the retail gasoline sales market. This can be seen on street corners across the nation.

Furthermore, with the steadily rising cost of gasoline, the cost of gasoline is an important economic factor for all persons in this country except the most affluent. Accordingly, the applicability of the Sherman Act prohibitions against price fixing to this dominant form of merchandising and economically important business to the public is a question which should be ruled upon by this Honorable Court. This is especially true since the Court of Appeals Opinion provides a blue print by which all gasoline suppliers can safely fix the price of gasoline at all self-service stations which they supply. The decision encourages centralization of pricing decisions of an unprecedented magnitude. The pricing decisions will no longer be made by the many thousands of competitors, but by a few gasoline suppliers.

The Court of Appeals opinion in this case runs counter to the line of authority announced by this Court concerning resale

price fixing in the decisions Dr. Miles Medical Company v. John D. Park & Sons, 220 U.S. 73, 31 S.Ct. 376 (1911) and Simpson v. Union Oil Company of California, 377 U.S. 13, 84 S.Ct. 1051 (1964), 1964 Trade Cases ¶71,085.

This Court has held that agreements to maintain resale prices are considered price fixing within the prohibition of Sherman §1 and resale price maintenance agreements are unlawful per se, regardless of the reasonableness of the prices. U.S. v. Parke Davis & Company, 362 U.S. 29, 80 S.Ct. 503 (1960) and Dr. Miles Medical Company v. John D. Park & Sons, 220 U.S. 73, 31 S.Ct. 376 (1911).

In Simpson v. Union Oil Company this Court struck down a consignment device that was used by a supplier of gasoline in an attempt by the supplier to legalize its control of the retail price of gasoline sold at Simpson's station.

In the instant case, the Court of Appeals held that the Defendant Nu-Way Oil Company was selling gasoline directly to the public, and Marcelena Hardwick was, for purposes of the antitrust law, an employee of Nu-Way, and was not an independent business person. However, the contract between Nu-Way and Marcelena Hardwick expressly repudiated the agency of the dealer for the supplier as well as any employment relationship between the two.

Simpson v. Union Oil Company involved a dealer who, in many ways, had less indicia of an independent entrepreneur than Marcelena Hardwick. Simpson was a mere one year lessee from Union Oil Company of the real estate and personal property involved in the gasoline

retailing; Marcelena Hardwick owned the land and the building used to sell gasoline. Simpson operated under Union's name; Marcelena operated under her husband's name. Thus Simpson held himself out to the public as a Union dealer and Marcelena Hardwick never held herself out to the public as Nu-Way dealer.

The core rationale of the Simpson decision is that the Court should not allow the antitrust laws, including Sherman §1, to be "avoided merely by clever manipulation of words, . . . The present coercive consignment device, if successful against challenge under the antitrust laws, furnishes a wooden formula for administering prices on a vast scale." Simpson v. Union Oil Company of California, 84 S.Ct. 1051, 1057 (1964).

The Court of Appeals attempts to distinguish Simpson from the instant case by relying on the method the operator was paid. Simpson was paid on a commission basis rather than a flat monthly payment as was Marcelena Hardwick. However, numerous retail salesmen in stores across the nation are paid on a straight commission basis and yet this does not effect their status as employees of the retail store.

The issue of employment as opposed to independent contractors is important in order to determine whether there were two parties who were separate enough to enter into a contract or conspiracy in order to engage the prohibitions of Sherman §1. The question at issue in Simpson was not whether Simpson and Union were so unified that the "contract, combination and conspiracy" requirements of Sherman §1 were not met; the question

was whether the consignment device was valid as a way of avoiding what was otherwise illegal price fixing.

The Court of Appeals in the instant case found that Marcelena Hardwick did not possess the indicia of an entrepreneur and that she was, for the purposes of the antitrust laws, operating a company station as an employee. In its determination of the existence of an employment relationship, the Court of Appeals considered the installation by Nu-Way of the gasoline pumps and tanks and electric consoles necessary to operate the self-service gasoline station on the Hardwicks' land. However, the right to install these items and the installation of them does not mean that the owner of the land is an employee of the installer of the equipment. The Court of Appeals cites no authority for the relevance of such facts to a determination of the existence or non-existence of an employer-employee relationship and Plain0-tiff knows of none. Furthermore, Marcelena Hardwick had the obligation of supplying employees to sell the gasoline, the obligation to supply the real estate, both land and building, on which the work was performed, had to supply the electricity, gas and water for the operation of the station, and whose status vis-a-vis Nu-Way was stated explicitly in the contract between her and Nu-Way Oil Company. Petitioner has found no cases in which a person having all these duties and characteristics was found to be an employee. The general rule of contracts is that a contract will be construed against its drafter, which was Nu-Way.

The Court of Appeals could not have been considering the common law tests of an employer-employee relationship since these clearly showed Marcelena Hardwick was not a Nu-Way employee. Nu-Way had neither the right to control the details of the work of Marcelena Hardwick and her employees, nor was there in fact any such exercise of control of the details of the work.

Nu-Way did not withhold taxes from Marcelena Hardwick's compensation and did not bear the expense of making the additional FICA contribution which it would have had to if Marcelena Hardwick was its employee. Nu-Way was insulated from tort liability by Marcelena Hardwick's independent contractor status in the event a defect in the condition of the premises e.g. the driveway, caused an injury to a customer. Thus, Nu-Way consistently treated Marcelena Hardwick not as an employee, but as an independent contractor.

Even though the Court of Appeals opinion spends much of its time analyzing the minute indicia of employee vis-a-vis independent entrepreneur status of Marcelena Hardwick, this is a misfocused inquiry. The proper focus of the inquiry should be how do we best fulfill the legislative intent of the Congress as expressed in the Sherman Act. The Sherman Act basically has Adam Smith's view of economics that society would be best served by the operation of the law of supply and demand and that this works best with a large number of small units competing with each other, each making its independent pricing decision. This is the

reason for the Sherman Act's prohibition against every contract, combination or conspiracy in restraint of trade. Congress has reiterated its opposition to vertical price maintenance agreements by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states. Consumer Goods Pricing Act of 1975, Pub.L. 94-145 (1975), amending 15 U.S.C. §45(a) Continental T.V. v. GTE Sylvania, 97 S.Ct. 2549, 2559 (1977) Footnote 19.

A contract requires two or more parties; a combination requires two or more parties, and a conspiracy requires two or more parties. Thus, the threshhold analysis in any Sherman Act case is: were two or more parties involved so that there could be by definition a contract, combination or conspiracy? The real question in this case should not be whether Marcelena Hardwick had more indicia of an employee than of an entrepreneur, but whether she was such an independent business person as was capable of entering into a contract, combination or conspiracy with Nu-Way in contravention of §1 of the Sherman Act. (For a consent decree case showing the Justice Department and Standard Oil's agreement on this very sort of question, see U.S. v. Standard Oil Company (N.D. Ohio, 1973) 1973 Trade Cases ¶74,475.) The Court of Appeals artificially segregates one portion of Marcelena Hardwick's business from the other - the gasoline sales from the other items which she sold - and cannot be justified. This analysis proves too much that a similar technique would justify the fixing of

prices by the supplier of every other item sold by Marcelena Hardwick in Al's Self-Service. For example, she could have agreed with the beer supplier that for a fixed fee of $150.00 $a month she would collect money for the sales of beer from refrigerators rented by the supplier from a third party and placed on her property at no cost to her. This would be an entirely self-service beer operation; she would have no obligation to polish the beer bottles, open the caps or put the beer in the customer's car. The same arrangement could be worked out with the suppliers of candy, potato chips, beans, or wholesale grocers for an entire inventory.

Any antitrust advisor worth his salt will find the Court of Appeals opinion fertile soil for ideas that will allow his client, whether manufacturer or intermediate supplier, to make the pricing decisions rather than the retailer. A blue print for circumvention of the proscriptions of the Sherman §1 has been laid before the Antitrust Bar by the Court of Appeals opinion in this case.

CONCLUSION

The opinion of the Court of Appeals in this case, if undisturbed by this Honorable Court, provides a means for the legalization of widespread price fixing in all areas of merchandising, heretofore in violation of Sherman §1, and will be a body blow to the price competition which this Court has consistently recognized as the bedrock of our free enterprise capitalistic system.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari has been furnished to Respondents' attorney of record, Paul Kratzig, Kendrick & Kratzig, 520 Guaranty Bank Plaza, Corpus Christi, Texas 78475, by first class mail this 30 day of May, 1979.

Bill Blackburn

BILL BLACKBURN
Attorney in Charge
for Petitioner

APPENDIX

NO. 78-1530

ALFRED H. HARDWICK, APPELLANT

v.

NU-WAY OIL COMPANY, INC.
AND
BILLY DELP

Appeal from the United States
District Court for the Southern
District of Texas

Decided February 14, 1979

Before INGRAHAM, GEE and FAY,
Circuit Judges

GEE, Circuit Judge:

Plaintiff Hardwick and his wife, Marcelina Meza Hardwick, entered into an agreement in September of 1968 with defendant Nu-Way Oil Company, one of three corporations directed by defendent Billy Delp, to operate a self-service gasoline station on U.S. Highway 77 in Ricardo, Texas. The Hardwicks were lessees (and later owners) of real estate upon which they constructed a small building to house a drive-in grocery store. Pursuant to the agreement

with the Hardwicks, at this same site Nu-Way installed the gasoline pumps, tanks and electronic consoles necessary to the operation of a self-service gasoline station. Nu-Way supplied the gasoline, purchased from a third party, on consignment to the station operators and retained the sole right to set the price of the gasoline at the pump. Nu-Way and its two related companies supplied gasoline in this manner to approximately 200 stations in a four-state area.

In March of 1971 plaintiff Hardwick leased, with an option to buy, another Highway 77 site approximately one-half mile from his original location. He constructed a building at this new location and, after Nu-Way declined to supply gasoline to him at the new site, he entered into a supply contract with Mohawk Petroleum Company and began a gas station/ fast-food service operation in October of 1971. The old location was closed, and all business dealings between plaintiff and Nu-Way were terminated. In the meantime, Marcelina Meza Hardwick, from whom plaintiff had become estranged, entered into negotiations with Nu-Way to reopen the station at the old location. She obtained a supply contract with Nu-Way and reopened the station in November of 1971. This contract, essentially the same contract as the earlier one between Nu-Way and plaintiff, provided as before that Nu-Way had the sole right to set the price of gasoline at the pump. Within six weeks, plaintiff closed his business at the new location and never reopened it.

to this appeal was the same: the station operator ordered gasoline from Nu-Way's supplier whenever the tanks needed replenishing; Nu-Way paid for the gasoline, installed and maintained the gasoline sales equipment at its own expense, and paid the operators either a fixed monthly sum or a fixed sum plus one cent per gallon sold; the operator furnished the land and the building for the convenience store and gasoline pumps and hired any personnel needed; the station operators performed no service in the gas station operation other than to collect money from drivers, who were required to fill their own tanks, and to account regularly to Nu-Way for the total amount collected.

Plaintiff brought this action under section 4 of the Clayton Act,[1] alleging that Nu-Way's contract with his wife was an illegal price-fixing agreement and was a per se violation of section 1 of the Sherman Act.[2] After extensive pretrial discovery and on stipulated facts, both parties filed motions for summary judgment. Plaintiff's motion was denied, and defendants' was granted.[3] We affirm.

Plaintiff's complaint alleges that defendants Nu-Way Oil Company and Billy Delp, along with co-conspirators Marcelina Meza Hardwick, Dynamic Industries, and Economy Oil Company engaged in a combination and a conspiracy in restraint of trade in violation of section 1 of the Sherman Act. The crux of this allegation is that the agreement between Marcelina Hardwick and Nu-Way Oil expressly fixed the retail price of gasoline sold to the public and was used by them to

implement a scheme of predatory pricing, which resulted in destruction of plaintiff's competing business. Plaintiff argues that Simpson v. Union Oil Co., 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), prohibits such an agreement. Defendants answer that the agreement is a valid consignment and that Simpson has no application in this case. Therefore, it is necessary for us to consider Simpson and its effect on the agreement at issue in some detail.

[1] An agreement between a seller and its buyer fixing the price at which the buyer may resell the product is a per se violation of section 1 of the Sherman Act. Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1961); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). For a time it was thought that a supplier could safely avoid the constraints of the Dr. Miles rule by consigning the inventory to independent distributors with a price-fixing provision in the consignment agreement. The Supreme Court, in United States v. General Electric Co., 272 U.S. 476, 488, 47 S.Ct. 192, 71 L.Ed. 362 (1926), held that there was no antitrust violation where the "owner of an article patented or otherwise," sought to sell his articles directly to the consumer by utilizing a "genuine contract of agency" and "fixing the price by which his agents transfer title from him directly to such consumer." Widespread use of the consignment device to avoid antitrust liability for resale price maintenance, however,

was dealt a severe blow by the Court in Simpson v. Union Oil Co., supra.

In Simpson the plaintiff was a year-to-year lessee of a retail outlet of Union Oil. He was required to sign a consignment agreement, under which title to the gasoline remained in the consignor Union Oil, and the retail price of the gasoline was set by Union. The company paid all property taxes on the gasoline, but the retailer was required to carry personal liability and property damage insurance because of the consigned gasoline, and he was responsible for all losses of the gasoline except for acts of God specified in the agreement. Simpson was compensated by a commission tied to the retail price of the gasoline, and he had to pay all costs of operating the retail outlet. When Simpson sold gas below the fixed price, Union refused to renew his lease and terminated the consignment agreement.

The Court refused to apply the General Electric precedent to uphold the consignment agreement in Simpson. Instead, the Court, relying on the substance of the agreement rather than its form, held that the "consignment" was in fact resale price maintenance, coercively employed, and was illegal under the antitrust laws. The decision is apparently not, however, an unequivocal condemnation of the use of the consignment device to set retail prices. The Court expressly stated that "an owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner."

But when a "'consignment device' is used to cover a vast gasoline distribution system, fixing prices through many retail outlets," the Court held that the consignment must yield to the antitrust laws. Simpson v. Union Oil Co., 377 U.S. at 21-22, 84 S.Ct. at 1057. General Electric was limited to but not overruled. Instead, the Court distinguished the earlier case on the narrow ground that the consignment agreement there involved patented articles.[4]

[2] Since the decision in Simpson, neither the Supreme Court nor this court has defined further the circumstances in which a manufacturer or supplier may utilize the consignment device to establish prices at the retail level. It is clear that if the manufacturer undertakes the capital investment and other expenses itself, as well as the inventory risk, and resells through its own outlet.[sic] Simpson does not apply. L. Sullivan, Handbook of the Law of Antitrust § 137 at 389 (1977). Less clear is when a manufacturer may establish retail prices for his goods where, as here, there is incomplete integration forward to the retail level. The Simpson Court's opinion has to two main underpinnings. The first element relied upon by the Court was that the Union Oil "consigness" were in fact independent businessmen, having "all or most of the indicia of entrepreneurs, except for price fixing." Simpson v. Union Oil Co., 377 U.S. at 20, 84 S.Ct. at 1056. The second element stressed by the Court was the vastness of the distribution

system and the pervasiveness of the price fixing accomplished by it. Id. at 22, 84 S.Ct. 1051.

Commentators have disagreed about the scope of the Simpson decision and its effect on the use of consignments,[5] but the courts generally have not interpreted Simpson as a blanket condemnation of all consignment agreements in which the manufacturer/supplier sets retail prices. See, e.g., Call Carl, Inc. v. B. P. Oil Corp., 554 F.2d 623, 627-28 (4th Cir.), cert. denied, 434 U.S. 923, 98 S.Ct. 400, 54 L.Ed.2d 280 (1977); Pogue v. International Industries, Inc., 524 F.2d 342, 345 (6th Cir. 1975); Greene v. General Foods Corp., 517 F.2d 635, 652-53, 656 (5th Cir. 1975), cert. denied, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976); American Oil Co. v. McMullin, 508 F.2d 1345, 1351-52 (10th Cir. 1975); Hardin v. Houston Chronicle Publishing Co., 434 F.Supp. 54, 56-57 (S.D.Tex.1977), aff'd, 572 F.2d 1106 (5th Cir. 1978); Roberts v. Exxon Corp., 427 F.Supp 389, 390-91 (W.D.La.1977); Goldinger v. Boron Oil Co., 375 F.Supp. 400, 406-09 (W.D.Pa. 1974) , aff'd, 511 F.2d 1393 (3d Cir. 1975). This Court has stated that Simpson must be read to prohibit resale price maintenance devices "where the risks of the distribution process are borne largely by numerous otherwise independent individuals or firms in competition with each other in a product for which there is a widespread demand on the level of the individual consumer." Greene v. General Foods Corp., 517 F.2d at 653. Our task, then, is to analyze the substance of the agreement between Nu-Way and

Marcelina Meza Hardwick; if we find that it contains the elements proscribed by Simpson, then we must hold that it is, as a matter of law, illegal per se and a violation of section 1 of the Sherman Act. Using this analysis, we find that, in her operation of the gasoline station, Marcelina Hardwick did not possess the "indicia of entrepreneurs" vital to the Court's rationale in Simpson.[6] Therefore, she was, for purposes of the antitrust laws, operating a company station as an employee, and there was no illegal price fixing.

[3] We turn to the agreement itself, to the discovery papers and to the stipulated facts for our analysis of this agreement in light of Simpson. Resolution of this issue is not without difficulty, because Marcelina Meza Hardwick exercised some attributes of an independent operator, while possessing as well many of the attributes of independent operation are apparent. The agreement itself provided that the station operator was to be considered an independent contractor. Moreover, the self-service gasoline station, operated by plaintiff and Marcelina Hardwick together and later by her alone, was located on realty leased and later owned by the Hardwicks. They operated a small drive-in grocery in conjunction with the gas station, and Nu-Way did not participate in the grocery business in any way. Nu-Way did not pay Social Security taxes on or withhold income taxes from the compensation paid to the Hardwicks. The station operator furnished any personnel required to staff the grocery store and to collect

for gasoline sales and also had all tax liability for the real estate serving as the site for the business. The station operator was responsible for the operating expenses of the two businesses. At no time did any sign at the station hold it out to the public as a Nu-Way gasoline station.

Yet, with respect to operation of the gasoline station, the indicia of an employment relationship are many. The agreement gave Nu-Way the right to install, at its sole cost, gasoline pumps, tanks, and electronic consoles that were necessary to operate a self-service gasoline station. Nu-Way retained all ownership of the gasoline sales equipment and maintained and repaired this equipment at its sole expense. Neither plaintiff nor his wife ever carried insurance covering damage to the gasoline equpment, nor did they pay any taxes applicable to the gasoline nor any personal property taxes on the gasoline sales equipment. Nu-Way alone acquired and kept current all permits and licenses required by law for the gasoline sales operation and retained title to the gasoline itself until it was sold through the pump to the consumer. Marcelina Meza Hardwick was paid a fixed salary of $325 monthly without regard to the retail price of the gas or the number of gallons sold.[7] Finally, the agreement provided that the station operator held the gas as a "consignee" of Nu-Way Oil.

For gasoline sales, the station operator only had the responsibility of collecting money from the customer. The customer would drive to the pump,

service his vehicle himself, and then go into the convenience store to pay for the gasoline. The operator would verify the amount purchased on the electronic consoles inside the store and then would collect the money. The operator performed no collateral services such as body repair work, lubrication, battery checks, oil changes, tire repair, tire checks or even cleaning windshields. The operator was required to account weekly to Nu-Way for the sales registered on the pumps; to this end the station operator read the pumps daily and deposited the total dollar volume directly into a Nu-Way bank account. A Nu-Way supervisor verified the deposits by coming to the station twice a month to read the pumps and to check the bank deposits.

We agree with the lower court that no illegal price-fixing agreement existed. We are mindful that contract terms such as "consignee" or "independent contractor" do not control antitrust analysis, but the substance of this agreement was that Marcelina Meza Hardwick was, as was her husband before her, a Nu-Way employee, with respect to the sale of gasoline, for purposes of the antitrust laws. In Simpson, as here, the contract between the parties provided that the price of gasoline would be set and changed solely at the instruction of the supplier. Yet there are significant differences in the two agreements. The Simpson station operator was responsible for all losses of the consigned gasoline, save specified acts of God. Moreover, his financial return was directly linked to

the retail price of gasoline; if prices set by his supplier were not competitive, financial loss was his because he had no guaranteed income. He was truly a "small, struggling competitor" who had all of the economic risks inherent in his position as an independent businessman but none of the correlative power to set competitive prices. The station operators' situation in the instant case presents a vivid contrast. While the agreement, as we have noted, is not devoid of indicia of independent operation, we believe that the station operator here in the Nu-Way distribution system was, in effect, a salaried part-time cashier. Nu-Way retained title to the gasoline and was responsible for all damage or loss to it until it was sold at the pump. More important, Nu-Way continued to bear the financial risks of the market place; Marcelina Hardwick was not affected by any pricing decision made by Nu-Way in that her salary remained constant regardless of the retail price of the gasoline. Any financial loss caused by market decline was absorbed by Nu-Way, not by the station operators.

The policy underlying prohibition of resale price maintenance was articulated recently by this court in Greene v. General Foods Corp., supra:

The ban on resale price maintenance that has developed from Dr. Miles through Parke, Davis, Simpson, and Albrecht has in part been premised upon the belief that, when a manufacturer undertakes to distribute its goods through a chain of independent dealers, the consumers'

ability to purchase at a free market price will be enhanced by the retailers' unfettered ability to set his retail price at the level he feels is most commensurate with local demand. See especially Dr. Miles. Moreover, the condemnation of retail price maintnance is also premised upon respect for the autonomy of independent dealers in the chain of distribution, regardless of any demonstration of increased competition with respect to the sale to ultimate consumers. Topco. This concern for the autonomy of independents grows in part from the view that competition at all levels of the distributive process is desirable and in part from the view that a manufacturer utilizing independent distributors and investing them with substantially all the risks of wholesale and retail distribution must also invest them with the signal prerogative of the independent businessman-the power to set his own price. Simpson. 517 F.2d at 656. We hold that the agreement between Nu-Way and Marcelina Meza Hardwick did not involve illegal price fixing because the station operator had no independence with regard to the gasoline sales, even though she was an independent businesswoman with regard to the convenience-store operation. Although the two businesses were located at the same site, they were two separate and distinct operations and should be analyzed separately for antitrust purposes. See American Oil Company Co. v. McMullin, 508 F.2d at 1351. Nu-Way station operators were simply not in the position of independent retailers who purchased

gasoline for resale to the public; in reality, they were little more than salaried conduits to enable Nu-Way Oil to make retail sales directly to the consumer. Because a retailer is entitled to set the price at which it sells its own products, Simpson v. Union Oil Co., 377 U.S. at 21, 84 S.Ct. 1051; Call Carl, Inc. v. B. P. Oil Corp., 554 F.2d at 623-24; Goldinger v. Boron Oil Co., 375 F.Supp. at 408-09, there was no violation of section 1 of the Sherman Act in the instant case.

Accordingly, the district court is AFFIRMED.

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1. 15 U.S.C. §15 authorizes treble damage relief and provides:

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained . . .

2. 15 U.S.C. §1 provides in pertinent part:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

3. The lower court based its ruling

on two grounds: it held that plaintiff did not have standing under §4 of the Clayton Act to complain of this alleged price-fixing violation and that even if standing were assumed, summary judgment must be granted because there was no illegal price fixing in this case. Hardwick v. Nu-Way Oil Co., 443 F.Supp. 940 (S.D.Tex.1978). We express no opinion on the district court's analysis of the standing issue. In considering the legality of the agreement at issue, we shall assume arguendo that plaintiff had standing to maintain the suit.

4. Justice Stewart, in dissent, thought the distinction was "specious". He viewed Simpson as overruling General Electric for all practical purposes. 377 U.S. at 26-27, 84 S.Ct. 1051.

5. E. g., Handler, Recent Antitrust Developments-1964, 63 Mich.L.Rev. 59 (1964); Rahl, Control of an Agent's Prices: The Simpson Case-A Study in Antitrust Analysis, 61 Nw.U.L.Rev. 1 (1966); 78 Harv.-L.Rev. 279 (1964); 17 Stan.L.Rev. 519 (1965); 43 Tex.L.Rev. 569 (1965).

6. The defendants also argue that its distribution system was not sufficiently vast to require application of the Simpson rule. We need not express an opinion on this contention because of

our holding concerning the indicia of Mrs. Hardwick's independence.

7. Plaintiff, before he gave up the station, was initially paid $225 monthly and later $75 monthly plus one cent per gallon sold, without regard to the price of the gasoline or its quality.

FIFTH CIRCUIT
OFFICE OF THE CLERK

March 26, 1979

EDWARD W. WADSWORTH
CLERK

TEL 504/589-6514
600 Camp Street
New Orleans, La.

TO ALL PARTIES LISTED BELOW:

NO. 78-1530 - ALFRED H. HARDWICK
v. NU-WAY OIL CO.
AND BILLY DELP

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate

Procedure for issuance and stay of Mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Messrs. Bill Blackburn
Joseph Bonner Dorsey
Mr. Paul G. Kratzig

NO. 73-C-88

ALFRED H. HARDWICK

v.

NU-WAY OIL COMPANY, INC.
AND
BILLY DELP

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MEMORANDUM OPINION

Plaintiff brought this action under § 4 of the Clayton Act, 15 U.S.C. § 15, seeking treble damages for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1. This action is before the Court on plaintiff's motion for partial summary judgment and defendants' cross-motion for summary judgment. Based on the depositions, answers to interrogatories and stipulations of fact, the Court concludes that there is no genuine issue as to any material fact, Fed. R. Civ. P. 56(c), and that summary judgment should be granted in favor of defendants.

The first amended complaint alleges that defendant, Nu-Way Oil Co., (Nu-Way), engaged in predatory retail price cutting which forced plaintiff out of business. Plaintiff asserts that

the predatory price cutting was accomplished through an illegal price fixing agreement in violation of § 1 of the Sherman Act, entered into between Nu-Way and the operator of the Nu-Way service station.

Nu-Way, during the time involved in this action, supplied gasoline to approximately 100 self-service gasoline stations in Texas and Arkansas. Two related companies, which plaintiff allege are co-conspirators, supplied gasoline to an additional 90 to 100 stations in Texas, Alabama and Mississippi. The gasoline was supplied on a consignment basis to the station operators with Nu-Way retaining the right to set the price of gasoline at the pump. Plaintiff was a Nu-Way station operator until he moved the location of his gasoline station and drive-in grocery store in 1971. Nu-Way declined to supply gasoline to plaintiff at his new location, so plaintiff began to buy his gasoline from another supplier. Plaintiff does not allege any damages caused by Nu-Way's refusal to continue to deal with him.

Plaintiff's theory of recovery is based on a novel joinder of a discriminatory price cutting allegation with a resale price fixing charge. After plaintiff opened his new gasoline station, his ex-wife, Marcelina Meza, obtained a supply contract from Nu-Way and re-opened the gasoline station at plaintiff's old location. For convenience, this old location will be referred to

as the "Nu-Way station" and plaintiff's new station will be referred to as the "Hardwick station". The Nu-Way station and the Hardwick station were within one-half mile of each other, and plaintiff alleges that Nu-Way used its price fixing clause in its agreement with Meza to engage in discriminatory price cutting. Plaintiff contends that he was forced to close his business one month after he opened his new station as a result of Nu-Way's predatory prices.

The complaint aserts that Nu-Way was in a position to engage in predatory retail price cutting because Nu-Way's numerous other outlets throughout Texas and Arkansas would allow Nu-Way to make up the profit lost through the price cutting at the one station. These allegations would appear to present a classic claim of discriminatory price cutting under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). 1/ However, in the Fifth Circuit, the plaintiff must meet a very strict jurisdictional test to succeed on a Robinson-Patman claim. Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973)(en banc). Littlejohn holds that at least one of the discriminatory sales must be made in interstate commerce for there to be jurisdiction under the Robinson-Patman Act. Plaintiff has not asserted a claim under the Robinson-Patman Act and the subsequent factual development in this case shows that plaintiff's claim would not meet the strict jurisdictional tests of Littlejohn. It is clear that

none of the alleged discriminatory sales occurred in interstate commerce so this Court would not have jurisdiction of a Robinson-Patman claim.

In order to circumvent the strict jurisdictional requirements of the Robinson-Patman Act, plaintiff has joined what are normally two independent federal antitrust torts into one claim. Plaintiff has alleged retail price fixing, which is a violation of § 1 of the Sherman Act, coupled with discriminatory price cutting which would be prohibited by § 2 of the Robinson-Patman Act. The price fixing allegation is necessary to give the Court jurisdiction and the price cutting allegation is necessary to show damages. Plaintiff alleges no damages that were a direct result of the price fixing. He alleges that Nu-Way used its price fixing capability to engage in the predatory price cutting. Plaintiff's only damages resulted from the price cutting. The issue therefore presented is whether a plaintiff may use an alleged price fixing allegation under the Sherman Act which does not directly injure him to circumvent the jurisdictional requirements of the Robinson-Patman Act and recover damages for a classic Robinson-Patman Act price cutting claim.

Section 4 of the Clayton Act, 15 U.S.C. § 15, authorizes treble damage relief and provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . .

> and shall recover threefold the damages by him sustained . . . .

15 U.S.C. § 15.

A literal interpretation of this statute would indicate that a plaintiff, no matter how remotely injured by any antitrust violation, could bring an antitrust action; however, courts have taken a more restricted view. For plaintiff to be able to bring this action, he must have standing to sue on the price fixing claim. To have standing under § 4 of the Clayton Act, a plaintiff must have suffered an injury of the type the antitrust laws were intended to prevent. Brunswick Corp. V. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Donovan Const. Co. v. Florida Tel. Corp., 564 F.2d 1191 (5th Cir. 1977). The Fifth Circuit had adopted the "target area" test to determine whether a plaintiff's injury is sufficient to confer standing. Donovan Const. Co. V. Florida Tel. Corp., supra; Southern Concrete Co. v. U.S. Steel Corp., 535 F.2d 313 (5th Cir. 1976); Tugboat, Inc. v. Mobile Trans. Co., 534 F.2d 1172 (5th Cir. 1976); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975).

The "target area" test arose as a means of limiting the class of potential plaintiffs to those persons who could most adequately vindicate the purpose of the antitrust laws. Although the ripple effects of an antitrust violation may be felt throughout various levels of

the economy, the "target area" test ensures against potentially disastrous recoveries by those only tenuously hurt. Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975).

To establish standing, the private antitrust plaintiff must show that he was within the "target area" of the alleged violation. To determine whether a particular plaintiff meets the "target area" test, it is necessary to examine the nature of the specific antitrust violation of which he complains and to ascertain what areas of the economy would be affected thereby. Southern Concrete Co. v. U.S. Steel Corp., 533 F.2d 313, 316 (5th Cir. 1976). In Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), the Court adopted a two-step approach for focusing on the affected area of the economy. First, the affected area of the economy must be identified. Second, the court must determine whether the claimed injury occurred within that area. Yoder Bros v. California-Florida Plant Corp., 537 F.2d 1347, 1360 (5th Cir. 1976) (citing In Re Multi-District Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973); cert. denied 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336).

Turning to the first inquiry, what area of the economy is threatened by the alleged price fixing of defendants? It is the retail sale of gasoline to the public. The complaint alleges that Nu-Way entered into an agreement with the operators of the Nu-Way stations

whereby Nu-Way retained the right to set the retail price of the gasoline sold through the Nu-Way station. But by fixing the retail price of gasoline, Nu-Way would also be removing any variation in prices between the various Nu-Way station operators. Thus the alleged price fixing also threatens to eliminate competition between the Nu-Way station operators. Therefore, the area of the economy threatened by the alleged price fixing is both the retail sales to the public and competition between Nu-Way station operators.

It is clear that plaintiff's claimed injury did not occur within this area of the economy. The alleged injury was not suffered by plaintiff as a public customer (or a governmental entity suing on behalf of the public) nor was he a Nu-Way station operator at the time of his alleged injury. Plaintiff was in competition with the Nu-Way station operators and the alleged price fixing agreement did not hamper his ability or restrict his freedom to compete with the Nu-Way stations. The price fixing agreement, if in fact it was one, would only interfere with the Nu-Way station operators' ability to compete. Thus, plaintiff does not have standing to sue under § 4 of the Clayton Act for an alleged price fixing claim.

Even assuming that plaintiff did have standing to bring a price fixing claim and therefore could combine a price fixing claim and a predatory price cutting claim, the defendants would be entitled to summary judgment in their favor since the facts show

that there was no illegal price fixing in this case. Plaintiff relies principally on Simpson v. Union Oil Co., 377 U.S. 13 (1964), which held that the antitrust laws prevent the use of a consignment device to fix prices in many retail outlets of a vast gasoline distribution system. Nu-Way supplies gasoline to its station operators on a consignment basis and plaintiff asserts that Nu-Way's consignment agreement is invalid under Simpson.

Defendants argue that Simpson only invalidates consignment agreements covering "vast" distribution systems and that their system of retail outlets is not "vast". Even adding the retail outlets of the related companies, there were only approximately 200 retail outlets over four states in Nu-Way's (and the related companies') distribution system. In magnitude, this is not to be compared with Union Oil's system of over 4,000 retail outlets over eight states, Simpson v. Union Oil Co., supra, at n.1, 15. Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1972), emphasized that a business practice attacked as a violation of § 1 of the Sherman Act by a single intrastate dealer must be broadly utilized over a large distribution system so as to have a substantial effect on interstate commerce. Nu-Way's distribution system does not approach the magnitude of Gulf Oil's system and therefore there may be some merit in defendants' argument. However, it is not necessary to reach the question of whether Nu-Way's distribution system is vast enough for

Simpson to apply, since the consignment device used by Nu-Way is not illegal under Simpson.

With respect to the Nu-Way station involved in this case, Nu-Way entered into an agreement with the lessee (and later the owner) of the land where a drive-in grocery was located. This location later became the Nu-Way station. Nu-Way acquired the right to install and did install at its sole cost, at this location, gasoline pumps, tanks and electronic consoles necessary for the operation of a self-service gasoline station. The station operator received a fixed sum of $225 monthly from Nu-Way which was later changed to a fixed sum of $75, plus commission of one cent per gallon of gasoline sold. 2/ Nu-Way paid the station operator monthly by a company check.

The agreement between Nu-Way and the operator of the Nu-Way station recites that Nu-Way remained the owner of the gasoline until it was sold and actually delivered to the customer, and that the operator held the gasoline only as a "consignee" of Nu-Way. The contract also provides that the operator is an independent contractor and that nothing in the agreement should be construed to create a partnership, joint venture or employment relationship between the parties.

Nu-Way supplied all of the gasoline to the station and retained all risk of loss of the gasoline until it was pumped through the gasoline pumps. The gasoline pumps had meters on them

which recorded the total volume of gasoline and the total amount of sales that passed through the pump. The station operator read these meters on a daily basis and from this determined the total dollar volume of the gasoline sales for that day. The station operator deposited the money from the gasoline sales in a Nu-Way bank account. Thus, all income from gasoline sales went directly to Nu-Way. A Nu-Way supervisor would visit the station every other week, read the gasoline pump meters, and verify that the correct amount had been deposited in Nu-Way's bank account. The station operator had to account for all sales as recorded on the gasoline pump meters; however, he was not responsible for any loss of gasoline before it passed through and was recorded by the meters. For example, if there was a leak in one of the underground tanks, the station operator would not be responsible for the lost gasoline; the risk of loss was on Nu-Way.

Nu-Way retained all ownership of the gasoline sales equipment, and maintained and repaired this equipment at its cost. Nu-Way acquired and maintained all necessary permits and licenses required by law for the gasoline sales operation. Nu-Way paid all taxes applicable to the gasoline sales and all personal property taxes on the gasoline sales equipment.

The station operator had no responsibilities with respect to the sale of gasoline other than to collect the

money from the customer. The customer would drive to the pumps, fill his vehicle with gasoline and then go into the grocery store and pay the operator. No services such as checking batteries, oil, or tires or cleaning windshields were provided by the station operator. The price of the gasoline was set by Nu-Way and the price of the gasoline was changed solely at Nu-Way's instruction.

The consignment device invalidated in Simpson bears little resemblance to the consignment involved in this case. In Simpson the station operator was responsible for all losses of the consigned gasoline. The return to the station operator was affected by the rise and fall in the market price of the gasoline as his commission declined as the retail price dropped. The dealers under the Union Oil consignment system possessed most of the indicia of independent businessmen who were in reality small independent competitors. The operators of the Nu-Way stations on the other hand have no independence with regard to the gasoline sales. They are independent businessmen with respect to their grocery store operations, but not with respect to the gasoline sales. The operator receives a fixed sum from Nu-Way regardless of the retail price of the gasoline. Nu-Way bears all risk of loss of the gasoline, controls the manner of selling the gasoline through its self-service equipment, and establishes and controls the price of gasoline. In effect, the operator leases a

location to Nu-Way and provides a part-time cashier for Nu-Way.

The facts show that instead of being a sham consignment as in Simpson where the operator was basically purchasing the gasoline from Union Oil, the consignment device here was a true consignment whereby Nu-Way was marketing its gasoline directly to the public. Nu-Way was not acting as a wholesale distributor to the station operators and the station operators were not "purchasing" the gasoline from Nu-Way. Rather, Nu-Way was making retail sales through its various outlets. Since a retailer can set his prices, there was no illegal price fixing and thus no violation of § 1 of the Sherman Act.

For the above reasons, defendants are entitled to have summary judgment entered in their favor. A final Judgment granting summary judgment in favor of defendants shall be entered this date.

The Clerk shall file this Memorandum Opinion and send copies to counsel.

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1 / Title 15 U.S.C. § 13a. provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the

> purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

2 / After Meza took over the Nu-Way station, she received a fixed sum of $325 monthly with no commission.